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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of)	Federal Communications Commission
)	Office of Secretary
Geographic Partitioning and Spectrum)	WT Docket No. 96-148
Disaggregation by Commercial Mobile)	
Radio Services Licensees)	
)	
Implementation of Section 257 of the)	GN Docket No. 96-113
Communications Act -)	
Elimination of Market Entry Barriers)	

To: The Commission

OPPOSITION OF AT&T WIRELESS SERVICES, INC.

AT&T Wireless Services, Inc. ("AT&T"), by its attorneys, hereby submits its opposition to the Motion for Stay^{1/} filed by the Rural Telecommunications Group ("RTG") of the Commission's Order^{2/} in the above-captioned proceeding.

ARGUMENT

To obtain a stay, the moving party must show that (1) it is likely to prevail on the merits; (2) it will be irreparably injured without a stay; (3) the issuance of the stay will not substantially harm other parties interested in the proceeding; and (4) the public interest will be served by the stay.^{3/} RTG's motion satisfies none of these four factors.

^{1/} Motion of the Rural Telecommunications Group for Stay Pending Judicial Review, WT Docket No. 96-148, GN Docket No. 96-113 (filed Feb. 20, 1997) ("RTG Motion").

^{2/} In the Matter of Geographic Partitioning and Spectrum Disaggregation by Commercial Mobile Radio Services Licensees, Implementation of Section 257 of the Communications Act - Elimination of Market Entry Barriers, WT Docket No. 96-148, GN Docket No. 96-113, FCC 96-474, Report and Order and Further Notice of Proposed Rulemaking (released Dec. 20, 1996) ("Order").

^{3/} WMATA v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C.Cir. 1977).

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I. RTG IS NOT LIKELY TO SUCCEED ON THE MERITS

RTG argues that it is likely to prevail on the merits of its appeal to the United States Court of Appeals for the District of Columbia Circuit because removing the exclusive nature of its members' ability to purchase partitioned licenses violated the congressional mandate to provide opportunity in the provision of PCS for rural telephone companies. In addition, RTG contends that by broadening the partitioning provisions, the Commission has delayed the provision of PCS to rural America. Both of these self-serving arguments are unsupported by the record and common sense.

RTG provides little basis for its assertion that its members will be precluded from acting as PCS providers. To the extent rural telephone companies have the advantage of existing facilities and an existing customer base, as RTG claims, they may well be the only willing buyers in many areas. As the United States Telephone Association stated in its comments in this rulemaking proceeding, "the Commission's proposals will in fact increase rural telcos' ability to participate in broadband PCS, by enabling them to obtain partitioned licenses outside of, or substantially larger than, their existing service area."^{4/}

Moreover, there is no evidence that expanding the pool of possible partitionees will prevent rural telephone companies from purchasing their desired licenses. Under current rules, A, B, and C block licensees are not required to partition to rural LECs. Thus, having paid fair market value for their authorizations, PCS licensees generally would choose to retain their entire service areas rather than accept a low ball offer from a rural telephone company. While the added competition might, in some cases, preclude rural carriers from

^{4/} Comments of the United States Telephone Association at 4 (filed Aug. 15, 1996).

getting a "deal," more than likely such a deal would not have been forthcoming under the previous regulations.

Similarly, RTG provides no support for its contention that the exclusive right to partition enticed rural telephone companies to forgo the PCS auctions in favor of post-auction partitioning deals. To the contrary, the prior auction rules permitted rural telephone companies either to enter into agreements with other licensees post-auction or to create bidding consortia pursuant to pre-auction agreements to partition among themselves. In this manner, the Commission attempted to encourage rural telephone companies to participate in the competitive bidding process. In any event, many of the BTAs available in the recently-concluded D, E, and F block auction were appropriately sized for rural carriers and there was no reason for such entities to presume that they would be able to obtain a more favorable deal through partitioning than through participation in that auction. In fact, the evidence demonstrates that many rural entities bid in the auction and many won licenses.^{5/}

There is also no basis for RTG's assertion that expanding partitioning rights will injure customers living in rural areas. As noted above, having more than one potential buyer in a given market increases the chances that a PCS licensee would choose to sell part of its service area to anyone. Furthermore, although rural LECs might be "natural" providers of PCS in rural areas, there is simply no grounds for concluding that other parties would fail to provide adequate service to such customers. For example, cellular licensees in rural service

^{5/} RTG complains that only 32 rural telephone companies won D-F block licenses. RTG Motion at 10 n.23. What RTG fails to mention is that there were only 125 winning bidders in that auction. Thus, rural telephone companies constitute more than 25 percent of the soon-to-be licensed PCS providers. RTG declines to reveal what percentage it would have considered a positive outcome.

areas ("RSAs") would have a strong incentive to build-out and offer PCS service in adjacent rural markets.

Finally, the Commission did not err by failing to adopt the right of first refusal proposal advanced by some rural LEC associations. As AT&T pointed out in its reply comments in this proceeding, giving rural telephone companies this right would have effectively preserved their exclusive partitioning authority.^{6/} No other party would bargain in good faith if it knew that a rural telephone company could preclude it from consummating the transaction. Prospective partitionees surely would not waste their time negotiating deals for the advantage of other entities. Moreover, contrary to the assertions of the rural LECs, the Commission correctly determined that this right of first refusal would be difficult to administer and could discourage partitioning.^{7/} Indeed as AT&T noted, it would likely be impossible for a PCS licensee to close a transaction if the proposed partitioned area encompassed more than one landline rural service area. In such case, the licensee and the prospective buyer would have to await the decisions of numerous rural LECs and then renegotiate for a possibly dissected geographic territory.^{8/} The Commission was entirely justified in concluding that RTG's right of first refusal "solution" is simply not feasible.^{9/}

^{6/} Reply Comments of AT&T Wireless Services, Inc. at 4 (filed Aug. 30, 1996) ("AT&T Reply Comments").

^{7/} Order at ¶ 17.

^{8/} AT&T Reply Comments at 5.

^{9/} Order at ¶ 17.

Because the Commission's Order is well-reasoned, based on sound evidence, and wholly consistent with the Communications Act, there is virtually no likelihood that RTG will prevail on the merits of its appeal.

II. RTG HAS NOT SHOWN THAT ITS MEMBERS WOULD SUFFER IRREPARABLE HARM ABSENT A STAY

A party requesting a stay must make a showing that it will be irreparably injured absent the issuance of the stay. RTG utterly fails this test. RTG's sole claim in this regard is that the D.C. Circuit Court of Appeals would be unable to render an impartial decision if the Commission "'cloaks [the R&O] in a presumption of validity." by failing to grant a stay. RTG apparently believes that the judges would be so swayed by the financial investment of non-rural telephone company partitionees and the Commission's endorsement of its own decision that they would uphold the Order against their better judgment.

This argument is pure conjecture and completely contrary to a long history of D.C. Circuit decisions on Commission licensing orders. To warrant grant of a stay, the asserted injury must be both "certain and great" and "must be actual and not theoretical."^{10/} RTG does not begin to satisfy these requirements. Indeed, a finding of irreparable harm based on RTG's unsupported theory would, in effect, render meaningless this prong of the stay test.

III. GRANT OF A STAY WOULD HARM OTHER PROSPECTIVE PARTITIONEES AND WOULD UNDERMINE THE PUBLIC INTEREST IN FAIR AND OPEN COMPETITION

RTG asserts that because a stay would merely preserve the status quo, it would not harm other parties. This argument is without merit. As the Commission stated, the vast

^{10/} See Wisconsin Gas Co. v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1984).

majority of commenters participating in this rulemaking proceeding supported the proposals to broaden the partitioning rules.^{11/} These parties correctly believed that such action would create additional opportunities for small businesses, niche services and rural wireless providers.^{12/} In this vein, the Commission properly concluded that retaining the partitioning restriction would constitute a significant barrier to entry for small businesses.^{13/} Contrary to RTG's suggestion, preserving this unnecessary and anticompetitive regulation pending final judicial review would result in significant injury to non-rural telephone companies and PCS licensees desiring to enter into partitioning arrangements.^{14/}

Similarly, such delay would undermine the public interest in increasing competition in the PCS marketplace, encouraging efficient spectrum use, and speeding service to unserved and underserved areas.^{15/} In contrast, RTG presents no evidence to support its speculative claim that the residents of rural America will be harmed if entities other than rural telephone companies are allowed to take advantage of the new partitioning rules pursuant to the timetable established in the Order.

^{11/} Order at ¶ 7.

^{12/} Id.

^{13/} Id. at ¶ 14.

^{14/} As is the case with all Commission decisions that have been appealed, the parties entering into transactions pursuant to the disputed Order must recognize that they do so at their own risk. This circumstance, however, does not justify holding in abeyance the effectiveness of the Order.

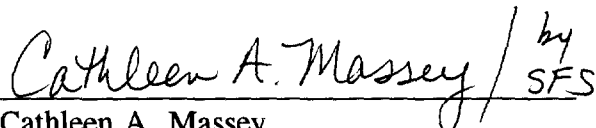
^{15/} Id. at ¶ 13.

CONCLUSION

For the foregoing reasons, the Commission should deny RTG's stay request.

Respectfully submitted,

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I, Tanya Butler, hereby certify that on this 27th day of February, 1997, I caused a copy of the foregoing Opposition of AT&T Wireless Services, Inc. to be served upon the following by messenger:

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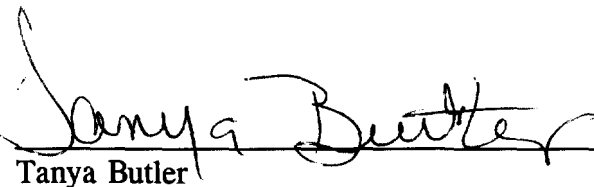
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